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NO. 87-1988

in the Supreme Court of the United States

October Term, 1987

In re Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates and Holywell Corporation,

Petitioners

vs.

The Bank of New York, et. al.

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals correctly applied the doctrine of mootness to the facts of this case?

2. Whether the bankruptcy court, district court and Court of Appeals for the Eleventh Circuit committed an abuse of discretion in requiring the posting of a bond as a condition to a stay pending appeal?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioners: Theodore B. Gould, Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, and Chopin Associates; Respondent Bank of New York; and Respondent, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust.

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STATEMENT OF THE CASE

The petitioners are five affiliated chapter 11 debtors. All were involved in the development of what is known as the Miami Center project, consisting of an office building, a hotel, a shopping arcade and a parking garage. The Bank of New York ("bank") financed construction of the project and was the major creditor. When the construction loans went into default and the bank began foreclosure proceedings the petitioners filed simultaneous voluntary petitions in the United States Bankruptcy Court for the Southern District of Florida, on August 22, 1984. The next day the bankruptcy court granted the debtors' motion for joint administration of the estates.

The debtors and the bank filed competing plans of reorganization. The creditor committees recommended, and the individual creditors overwhelmingly approved, the bank's amended plan and rejected the plans submitted by the debtors. The bank's plan provided for the substantive consolidation of the debtor estates and further provided for the creation of the Miami Center Liquidating Trust and the appointment of a liquidating trustee to administer the trust property in accordance with the terms of the plan.

The trust was funded, *inter alia*, by all of the debtors' 11 U.S.C. Section 541 (a) defined assets, including proceeds from the sale of the Miami Center property to the bank or its nominee, and the proceeds of sale of what is known as the Washington properties to third parties. On August 8, 1985, the bankruptcy court confirmed the bank's plan (246a).

The debtors moved the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing at which the bankruptcy court took evidence of the amount owed creditors and the value of the debtors' assets, the court granted a stay conditioned upon the posting of a $140 million

bond (46a). On emergency motion of the debtors, the district court lowered the amount of the bond to $50 million on the assumption the appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. An appeal of this ruling to the Eleventh Circuit was unsuccessful. No further relief from this order was sought. The debtors did not seek an injunction against implementation of the plan. As there was no bond posted, on October 10, 1985, the plan became effective and the liquidating trustee conveyed the Miami Center property to the bank's designee for $255.6 million, all as provided in the confirmed plan. The Miami Center property conveyed included fixtures, furnishings and equipment. The bank not only acknowledged it had no further claim against the debtors (excepting only certain claims for fees and costs incurred in enforcing the claim) it also paid the net cash difference between its lien and the purchase price to the liquidating trustee. The trustee then began paying the more than 400 creditors in each class of creditors from reserves established for that purpose (46a).

On appeal to the district court, the debtors attacked the consolidation order and the confirmation order, and the bank and the liquidating trustee moved to dismiss that appeal as moot. The district court held the bankruptcy court had failed to enter sufficient findings of fact and conclusions of law to support an adequate appellate review, and it remanded the case to conduct a hearing for that purpose (47a). The district court denied the bank and the trustee's motions to dismiss the appeal as moot.

On remand, after hearing, the debtors and the bank each submitted proposed findings and conclusions. The bankruptcy court adopted those proposed by the bank. The bankruptcy court held that, *inter alia*, no stay was in effect, the plan has been consummated, and "it is legally and practically impossible to unwind the consummation of the bank's plan

or otherwise restore the status quo before confirmation" (96a). The debtors appealed again.

Without considering the issue of mootness, the district court addressed the merits and the bankruptcy court's elaborate findings (52a), and affirmed in all respects (11a). The debtors appealed to the Eleventh Circuit, which ultimately dismissed the appeal as moot because the plan had been substantially consummated and the court could not grant meaningful relief to the debtors if they prevailed (42a). The debtors thereafter filed Petition for Writ of Mandamus, (Case No 87-1989) and the instant Petition for Writ of Certiorari (Case No: 87-1988).

The debtor had previously filed a petition for writ of mandamus to the Eleventh Circuit to correct certain perceived abuses. That petition was denied (1a).

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit properly applied the doctrine of mootness to the facts of this case. No stay has been in effect, the plan has been substantially consummated for several years, creditors have changed their positions in reliance on the confirmed plan, and the court could not grant meaningful relief even if the debtors were to prevail. The petitioners strain to create a conflict among the federal appellate courts on the issue of mootness where none exists. The federal courts of appeal uniformly decline to hear the merits of an appeal on the ground of mootness when no effective relief can be granted.

The bankruptcy court, the district court and the Eleventh Circuit did not abuse their discretion in requiring the debtors to post a bond as a condition to a stay pending appeal. Where there were over 400 creditors with claims amounting to approximately $350 million, the requirement of a bond

pending appeal of the confirmation order was surely not in error. This Court should not grant a writ of certiorari in this situation.

ARGUMENT

THE ELEVENTH CIRCUIT PROPERLY APPLIED THE DOCTRINE OF MOOTNESS TO THESE PROCEEDINGS

The Eleventh Circuit's application of the doctrine of mootness in this case was entirely proper. Its order to the district court requiring dismissal of the appeal from the bankruptcy court's order of confirmation of the plan of reorganization was consistent with logic and the law governing substantially consummated plans of reorganization.

The petitioners' argument that the Eleventh Circuit misapplied the doctrine of mootness and that its opinion in this case directly conflicts with the Ninth Circuit's opinion in *In Re Sun Valley, Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987), and other decisions of the federal circuits cited therein, is wrong. A careful reading of those cases reveals no conflict with the Eleventh Circuit's decision sought to be reviewed.

The Eleventh Circuit's decision in this case is consistent with the decision of the Ninth Circuit in *In Re Sun Valley Ranches, supra.* In that case, the *Sun Valley* court held that the debtor's appeal from an order lifting the 11 U.S.C. Section 362 automatic stay in order to permit a foreclosure sale to go forward was not rendered moot despite the debtor's failure to obtain a stay, because the court could give meaningful relief—the relief sought was the undoing of the effect of the foreclosure sale, and the purchaser at the sale was a party to the appeal. 823 F.2d at 1375. The Ninth Circuit decision simply carved out a "narrow exception" to the otherwise

general rule that a debtor's failure to obtain a stay renders an appeal moot once the asset is sold. The exception exists where the purchaser is before the court and the court can rescind the sale without prejudice to the rights of parties not before the court, and thereby grant effective relief to the debtor. 823 F.2d at 1375. This rule is consistent with other decisions of the Ninth Circuit, as well as those of the Eleventh Circuit.

Reliance on the *Sun Valley* case is a creative attempt to find a conflict between circuits where none really exists. The operative facts are easily distinguishable. As the *Sun Valley* court stated:

> This exception to the general rule is especially appropriate here, where the foreclosure sale is *subject to statutory rights of redemption*. Where the assets sold were shares of stock, we said that 'the fact that the purchaser is a party to [an] appeal does not change the mootness rule' (emphasis added).

823 F.2d at 1375, quoting *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985).

There is no issue as to a statutory right of redemption in the case at bar. No statutory or contractual delay exists in the enforceability of a plan of reorganization which has been confirmed.

The fact that the purchaser of property sold under the plan is a party to this proceeding does not alter the inapplicability of the exception noted in *Sun Valley*, for it is only one factor to consider in determining whether the court can grant meaningful relief. The Ninth Circuit opinion in *Algeran*, cited with approval in *Sun Valley*, states: "the fact that the purchaser is a party to the appeal does not change the applicability of the mootness rule," specifically

relying upon the Eleventh Circuit's *Sewanee* decision. 759 F.2d at 1424.

The statements made in *Sun Valley, supra*, that the court declined to follow the Eleventh Circuit's opinions in *Sewanee, supra* and *In re Matos*, 790 F.2d 864 (11th Cir. 1986), must be read in proper context. The *Sun Valley* decision is based upon a stated perception that the Eleventh Circuit follows a *per se* refusal to recognize an appeal on the merits in such a case. That is not an accurate statement of *Sewanee*. In that case, the Eleventh Circuit recognized that "[i]n *some* situations, failure to obtain a stay pending appeal will render the case moot." 735 F.2d at 1295 (emphasis added). That is not a *per se* refusal to consider the merits of an appeal in all instances where no stay of the effect of an order has been obtained. Moreover, in *Worcester v. Rosner*, 811 F.2d 1224 (9th Cir. 1987), the Ninth Circuit noted that in its *Algeran* decision, it followed "the Eleventh Circuit's approach as to when a stay pending appeal is required in order to prevent mootness." 811 F.2d at 1228.

The petitioners erroneously assert that the Eleventh Circuit's opinion in the instant case is bottomed entirely on a finding that the plan had been substantially consummated as a basis for dismissal of the appeal because of mootness. In fact, the Eleventh Circuit in this case relied on *In re AOV Industries, Inc.* 792 F.2d 1140 (D.C. Cir. 1986), *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), in considering all of the factors in reaching a determination of mootness:

> These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the *passage of time*, whether the plan has

> been implemented and whether the plan has been substantially consummated, and *whether there has been a comprehensive change in circumstances.* (Emphasis added).

Miami Center Limited Partnership v. The Bank of New York, 838 F.2d at 1555.

The court then went on to analyze the change in circumstances that led to the conclusion that the debtors' appeal was moot:

> We turn, then, to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some 'super priority' ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.
>
> The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received as part of the reorganization plan, and the consequences of the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to $5 million—$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totaling approximately $30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million—$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorneys fees for its defense.

> All of this demonstrates that the consequences of what debtors seek strike at the sale of the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not 'stand independently and apart from the plan of arrangement,' but rather 'the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand solely upon the order confirming the plan of arrangement.' 652 F.2d at 797. It is 'impossible to fashion effective relief' for the bank. *Id.* Granting the remedies the debtors seek would 'create an unmanageable, uncontrollable situation for the Bankruptcy Court.' *Id.* (footnote omitted)

838 F.2d at 1551.

It is abundantly clear that the Eleventh Circuit's ruling on mootness is not premised solely upon the notion of substantial consummation.

The petitioners' conspicuous failure to cite the Ninth Circuit's decision in *Roberts Farms* is worthy of mention because of the claim made in the petition that the decision sought to be reviewed conflicts with *In re AOV Industries, Inc.* The court in *AOV* stated that "*Roberts Farms* does not stand for a bright-line rule that 'substantial consummation' forecloses any possibility of relief from court and creditor-approved reorganization plans." *AOV*, 792 F.2d at 1148. Nothing in the Eleventh Circuit's opinion conflicts with that statement. As in *Roberts Farms*, the property transactions herein "do not stand independently and apart from the plan of arrangement. Here the many intricate and involved transactions . . . were contemplated by the plan . . . and stand solely upon the order confirming the plan . . ." *Roberts Farms*, 652 F.2d at 797.

Similarly, the Fourth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988), is supportive of the liquidating trustee's position that this case is moot because the court cannot grant meaningful relief. The petitioners cite to *Central States* to the effect that substantial consummation does not immunize a plan from appellate review (p. 20, Petition for Writ of Certiorari), yet that statement is taken wholly out of context. The next sentence in *Central States* reflects that the Fourth Circuit's approach to mootness is consistent with that of the Eleventh Circuit:

> On the other hand, dismissal of the appeal on mootness grounds is *required* when implementation of the plan has created, extinguished or modified rights of persons not before the court, to such an extent that effective judicial relief is no longer practically available. (Emphasis added).

841 F.2d at 96.

The petitioners also cite *Matter of King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980) as further evidence of a conflict among the circuits. That conflict does not exist. The *King* court "recognize[d] that it is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions or abstract propositions." 651 F.2d at 1331, citing *Mills v. Green*, 159 U.S. 651 (1895). The *King* court unequivocally stated, "if we assumed that the only effect of reversal on appeal would be to order the impossible, we would not address the merits of the appeal." 651 F.2d at 1332, citing *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 186-91 (9th Cir. 1977). As that court, unlike the Eleventh Circuit, found a reversal could effect meaningful relief, it heard the merits of the appeal. The Eleventh Circuit clearly found no such relief was possible.

The petitioners next search in the Fifth Circuit for a conflict, citing *Matter of Latham*, 823 F.2d 108 (5th Cir. 1987) and *In re Louisiana World Exposition, Inc.*, 823 F.2d 1391 (5th Cir. 1987).

The *Latham* case only held that "[s]atisfaction of a judgment does not moot the appeal unless the defendant-appellant voluntarily satisfies the judgment, thereby misleading the plaintiff into believing the controversy has ended." 823 F.2d at 111 (citations omitted). That is hardly a conflict with the dismissal in this case.

The *Louisiana World Exposition* case does not even mention the doctrine of mootness, and the liquidating trustee is unable to understand why it is cited.

The petitioners' ultimate complaint is their failure to obtain a stay should not preclude a review of the case on the merits. This argument does not overcome well established principles of appellate review of bankruptcy orders. "[T]he mootness doctrine promotes an important policy of bankruptcy law—that court approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981).

The Ninth Circuit has stated that "[i]n the field of administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." *Roberts Farms*, 652 F.2d at 796.

The mootness doctrine is a practical and fair method of promoting the finality of judgment and certainty of relief which the bankruptcy courts need in order to properly function as reorganization tribunals. The significance of this should not be lightly dismissed. The Eleventh Circuit, in a thorough analysis, properly dismissed the appeal as moot.

THE BANKRUPTCY COURT PROPERLY REQUIRED THE POSTING OF A BOND PENDING APPEAL OF THE CONFIRMATION ORDER

The bankruptcy court properly exercised its discretion in requiring the debtors to post a bond to stay implementation of the plan pending appeal. *See* Bankruptcy Rule 8005.

Following confirmation of the plan on August 8, 1985, the petitioners moved the bankruptcy court for a stay pending appeal. The bankruptcy court heard evidence as to the amount of the claims of over 400 creditors (approximately $350 million) and the value of the debtors' assets. After the bank and the debtors submitted memoranda of law, the bankruptcy court agreed to stay implementation of the plan upon the posting of a $140 million bond by the petitioners. The petitioners promptly appealed to the district court on an emergency basis, and that court lowered the bond to $50 million as a condition to a stay of enforcement of the plan for ninety days. The debtors' appeal of this ruling to the Eleventh Circuit was denied. The debtors never sought review of that denial before this Court, nor did they seek a temporary injunction against implementation of the plan. *See Texaco, Inc. v. Penzoil Co.*, 626 F.Supp. 250 (S.D.N.Y. 1986), modified on other grounds, 764 F.2d 1133 (2d Cir.), reversed on other grounds, 107 S.Ct. 1519 (1987).

The decision whether to grant a stay pending appeal, and the amount of a bond as a condition of such a stay, are discretionary matters left to the trial court. Such decisions are based upon the particularized facts of each case. This Court does not normally review such decisions. *See United States v. Johnson*, 268 U.S. 220, 227 (1925). This is particularly true where the acts complained of have already been reviewed by the district court and the court of appeals. In such circumstances, this Court has been particularly reluctant to issue a writ of certiorari. *See Rodgers v. Lodge*,

458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The petitioners imply that no bond should ever be required of debtors in order to stay a bankruptcy appeal because it is obvious debtors cannot afford to post such bonds. Compassionate as this suggestion may be, it overlooks the equally obvious fact that the creditors are entitled to receive their money no later than is absolutely essential. Once a plan has been proposed, voted upon, and confirmed, the debtors' rights have less claim to the court's attention. The equities are clearly in favor of the over 400 creditors rather than the five debtors. The posting of a $50 million bond on an appeal involving $350 million in claims cannot rationally be said to be abuse of discretion.

The issuance of a writ of certiorari in this case would be wholly improper. The petition should be denied.

CONCLUSION

This Court should deny the debtors' petition for writ of certiorari, for the Eleventh Circuit properly dismissed the case as moot. No stay was in effect, the plan has been substantially consummated for several years and hundreds of creditors have been paid. The court of appeals, after reviewing the same facts, found it could not undo this plan because it could not grant effective relief in the event of a reversal.

The Eleventh Circuit, in reliance on well-established case law, has held there can be no "piecemeal dismantling" of a plan of reorganization. *Miami Center Limited Partnership v. the Bank of New York*, 838 F.2d at 1554, citing *AOV*, 792 F.2d at 1149.

There is no conflict among the federal circuit courts of appeals on the issue of mootness. They uniformly decline to hear the merits of an appeal where, as in this case, no effective relief can be granted.

The petitioners' claim that *certiorari* should issue on the ground that no debtor should be required to post a bond to stay implementation of a plan of reorganization is entirely frivolous and should be denied.

It is now almost three years since the plan was confirmed and hundreds of creditors have been paid. It is inconceivable

how the Court can undo the plan at this stage. The case is moot and the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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